No. 75-1033

In the Supreme Court of the United States

OCTOBER TERM, 1975

ERNEST FAIRCHILD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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AUTHORITIES CITED

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court:

Petitioner, Ernest Fairchild, prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit entered on November 25, 1975.

(a) OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is unreported at the date of the preparation of this Petition. It is reprinted in the Appendix attached hereto, App. p. 1 infra.

(b) JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, was entered on November 25, 1975. (Appendix B, infra) Petition for Rehearing was denied on December 23, 1975. (Appendix C, infra)

The jurisdiction of this Court is invoked under 28 United States Code § 1254(1).

QUESTION PRESENTED FOR REVIEW

1. Is a warrant required prior to an arrest when no exigent circumstances exist for a warrantless arrest and there is abundant time to obtain a warrant?

CONSTITUTIONAL PROVISION INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Petitioner was arrested without a warrant on November 24, 1972. A two-count indictment was returned on July 25, 1974 charging him with (1) selling seventy counterfeit $10 Federal Reserve Notes on or about November 8, 1972, and (2) passing an additional counterfeit $10 Federal Reserve Note on or about November 13, 1972, in violation of 18 United States Code §§ 473 and 472, respectively. After a jury trial, petitioner was convicted on both counts. He was sentenced to concurrent three year terms of incarceration on each count.

Prior to trial, petitioner filed a motion to suppress evidence which had been seized at the time of his arrest. An evidentiary hearing was conducted which revealed that petitioner was arrested without a warrant on November 24, 1972, although all of the information upon which his arrest was predicated was in the possession of United States Secret Service Agents by, at the latest, November 21, 1972. (Tr. 52) The trial court found "that everything that was known to justify the arrest of the defendant on the 24th was also known on the 21st. . . ." (Tr. 53) The District Court summarized the issue before it as:

> "The issue is, once you determine you have probable cause and you have plenty of time to get a warrant, should you make a probable cause arrest without one or should you get one." (Tr. 60)

The motion to suppress was denied and the items seized at the time of petitioner's arrest were subsequently introduced into evidence at trial.

REASONS FOR GRANTING THE WRIT

I.

THE JUDGMENT OF THE SEVENTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE NINTH CIRCUIT'S DECISION IN UNITED STATES v. WATSON, 504 F. 2d 849 (1974), cert. granted 420 U.S. 924 (1975). REVIEW BY THIS COURT IS WARRANTED TO RESOLVE THE CONFLICTING DECISIONS.

The fundamental question presented by this case is whether a warrant must be obtained prior to arrest where there is adequate opportunity to obtain a warrant and an absence of exigent circumstances excusing its procurement. Contrary to the decision below, that question has been answered in the affirmative by the Ninth Circuit in *United States* v. *Watson,* 504 F. 2d 849 (1974), cert. granted 420 U.S. 924 (1975). There, the Court held that a warrantless arrest six (6) days after the arresting officer had probable cause to arrest the defendant was unreasonable and in violation of the Fourth Amendment. Relying on *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971), a majority of the Court concluded that an arrest warrant is required in the absence of exigent circumstances. No exigent circumstances having been shown, and no explanation for the failure to present the question of probable cause to a magistrate having been made—the arrest was found to be unlawful. The correctness of that decision presently awaits a definitive ruling by this Court. If the Ninth Circuit's decision is affirmed, the judgment below must be reversed.

II.

WARRANTLESS ARRESTS, LIKE WARRANTLESS SEARCHES, SHOULD BE TREATED AS PRESUMPTIVELY IN VIOLATION OF THE FOURTH AMENDMENT.

The principle that warrantless probable cause arrests are unlawful when there is adequate opportunity to obtain a warrant finds support in the pronouncements of this Court. The purpose of the Fourth Amendment warrant requirement was aptly summarized by this Court in *Johnson* v. *United States,* 333 U.S. 10, 13-14 (1948):

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only to the discretion of police officers. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

The preference for use of an arrest warrant was articulated in *Beck* v. *Ohio,* 379 U.S. 89 (1964). See also *Wong Sun* v. *United States,* 371 U.S. 471, 497 (1962) (J. Douglas concurring). And this Court has consistently interpreted the Fourth Amendment to require that the issue of probable cause be submitted to a neutral and detached magis-

trate whenever possible. *United States* v. *United States District Court,* 407 U.S. 297, 315-18 (1971); *Terry* v. *Ohio,* 392 U.S. 1, 20-22 (1968).

Moreover, sound reasons exist for holding that a warrant must be obtained prior to arrest where there is adequate opportunity to obtain one and a lack of necessity for swift action without prior judicial approval. The Fourth Amendment to the United States Constitution itself expressly protects against unreasonable searches and seizures of the "person" as well as of "houses, papers and effects." It applies with equal force to the arrest of an individual as to the search and seizure of his property.

Of course, the central inquiry, whenever, as here, a Fourth Amendment violation is alleged, is the reasonableness under all of the circumstances of the particular governmental invasion of a citizen's personal security that is involved. There is no definitive formula for the determination of reasonableness under the Fourth Amendment. Reasonableness varies with the subject matter and the circumstances. The facts of each case control the determination.

In assessing reasonableness, it is necessary to focus upon (1) the governmental interest which allegedly justifies the specific official intrusion and (2) the interest of the private citizen sought to be intruded upon. By balancing the need to search or seize against the invasion which the search or seizure entails—a determination of reasonableness may be had.

The ability to arrest upon probable cause without first securing a warrant must arise, if at all, from the necessity to protect the legitimate interests of law enforcement. Obviously, effective law enforcement demands prompt and

swift action at times. An intolerable handicap for legitimate law enforcement efforts might result if warrants were required for every arrest. Consequently, in an emergency situation, where time is of the essence, an arrest on probable cause is and should be viewed as constitutionally reasonable, even in the absence of a warrant.

The unique facts of this case clearly demonstrate, however, there was no emergency or other legitimate law enforcement concern for prompt action. To the contrary, no "exceptional circumstances" are cited which might have justified the warrantless arrest. No evidence or contraband was threatened with removal or destruction. It does not appear that the petitioner was fleeing or likely to take flight. Nor does it appear that there was apparent danger to any officer or other person which required that the arrest proceed without first awaiting acquisition of a warrant. Except for the inconvenience to the officers in preparing the necessary papers and presenting the evidence to a magistrate, no reason is suggested for not obtaining a warrant issued by a detached and neutral magistrate prior to petitioner's arrest.

Balanced against the governmental interest in effective law enforcement is the individual's interest in his personal privacy. An individual's right to personal privacy should be accorded the same protection that is given to an individual's dwelling or effects. The notion that the places and things protected under the Fourth Amendment receive that protection only as a logical extension of the protection accorded to the individual was underscored in *Katz* v. *United States,* 389 U.S. 347 (1967). It was there recognized that the ultimate privacy to be protected by the Fourth Amendment is that of the person. Consequently, one's

personal liberty should be accorded the same protection under the Fourth Amendment as the ownership and possession of property now enjoy.

In the absence of exigent circumstances, an arrest should be made only with a warrant issued by a magistrate on a showing of probable cause, supported by oath or affirmation, as required by the Fourth Amendment. Apart from those cases where the offense is committed in the presence of the officer or where exceptional circumstances excuse the requirement of a warrant, arrests without warrants, like searches without warrants, should be the exception, not the rule in our society. Implicit in the Fourth Amendment's protection against unreasonable searches and seizures is its recognition of an individual's right to personal privacy and freedom of movement. To sanction a procedure which allows police to arrest at their discretion without the prior assessment of probable cause by a neutral and detached magistrate—even though the opportunity for such a magistrate's determination is clearly present—undermines the purpose of the Fourth Amendment and the protection it affords.

The facts of this case clearly indicate that the arresting agents had probable cause to arrest petitioner for the offense on which he was ultimately arrested at least three (3) days prior to his arrest, but at no time attempted to obtain prior judicial approval for that arrest. No facts were produced to demonstrate that a warrant could not have easily been obtained during the three day delay. To the contrary, the testimony at the suppression hearing indicated that every opportunity existed to obtain an arrest warrant. Where there is relative ease in obtaining a warrant and adequate opportunity to do so, and a lack of any necessity for swift action without prior judicial approval,

it is unreasonable not to require that the determination of probable cause be submitted to a disinterested magistrate prior to arrest. Accordingly, it was error for the trial court to have denied petitioner's motion to suppress evidence, and the judgment of the Seventh Circuit Court of Appeals affirming that denial should be reversed.

CONCLUSION

For the reasons set forth above, it is respectfully prayed that this Petition for a Writ of Certiorari to review the judgment of the Court of Appeals for the Seventh Circuit be granted.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 75-1283

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ERNEST FAIRCHILD,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 74 CR 538
FRANK J. McGARR, Judge.

ARGUED SEPTEMBER 24, 1975—DECIDED NOVEMBER 25, 1975

Before SWYGERT and STEVENS, *Circuit Judges,* and KUNZIG, *Judge.* *

STEVENS, *Circuit Judge.* Appellant contends that his conviction for distributing counterfeit bills[1] should be reversed because (1) the delay of 27 months between his arrest and trial violated his right to a speedy trial; and

* Honorable Robert L. Kunzig of the United States Court of Claims is sitting by designation.

[1] Defendant was found guilty of (1) selling 70 counterfeit $10 Federal Reserve notes in violation of 18 U.S.C. § 473, and (2) passing an additional counterfeit $10 Federal Reserve note (on a different date), in violation of 18 U.S.C. § 472.

(2) evidence seized during a search incident to a warrantless arrest should have been suppressed because the arresting officers had ample time to obtain a warrant. He also questions the sufficiency of the evidence and the admissibility of the testimony of the witness Lee.

I.

The defendant was arrested on November 24, 1972, the indictment was returned on July 25, 1974, and his trial began on February 24, 1975. This delay of 27 months is long enough to require consideration of the other factors identified in *Barker* v. *Wingo,* 407 U.S. 514 (1972).[2]

The Government's explanation for the delay of 20 months between arrest and indictment was that it was attempting to find others who were involved in the counterfeiting operation in order to try them with Fairchild. The Government also explained that before proceeding against Fairchild it wanted to complete the trial of an important witness whose testimony might have been unavailable had he been tried with Fairchild. These reasons are sufficient to foreclose any claim that the pre-indictment delay was designed by the Government to prejudice Fairchild's defense. *See United States* v. *Ricketson,* 498 F.2d 367, 371 (7th Cir. 1974).

Neither of the two remaining factors—the defendant's assertion of his right and possible prejudice caused by the delay—lends any support to defendant's claim. He has made no showing of actual prejudice to his defense, other

[2] In his opinion in *United States* v. *Lockett,* No. 75-1398, released today, Judge Kunzig identifies the relevant factors to be balanced: "(1) length of delay, (2) reason for delay, (3) assertion of the right, and (4) prejudice to defendant."

than a vague allegation that his memory was impaired. And defendant made little effort to have his case tried sooner. Although at some point after the indictment (the record is not clear as to the exact date) a speedy trial motion was filed, this motion was later withdrawn by defendant's counsel who said there was "nothing urgent" about the case. Thus, the defendant simply has not shown enough prejudice to tip the *Barker* v. *Wingo* balance. Compare *United States* v. *De Tienne,* 468 F.2d 151 (7th Cir. 1972), *cert. denied* 410 U.S. 911 (no actual prejudice), with *United States* v. *Macino,* 486 F.2d 750 (7th Cir. 1973) (one witness died and memories were *demonstrably* impaired).[3]

II.

Defendant's second asserted ground for reversal is the district court's denial of his motion to suppress evidence which was found in a search of his car at the time of his arrest. Defendant does not question the fact that the search was proper if the arrest was valid; nor does he challenge the existence of probable cause to arrest him. Rather, he contends that since the agents were in possession of ample information to justify the issuance of a warrant at least three days earlier and failed to offer any valid reason for not obtaining a warrant, the

[3] The fact that most of the delay occurred prior to the indictment may explain the absence of a prompt demand for trial, *see United States* v. *Lockett, supra,* at p. 2, but does not demonstrate that appellant's defense was prejudiced; he knew that he had been arrested on a counterfeiting charge.

warrantless arrest was a violation of his rights under the Fourth Amendment.[4]

In the absence of "a few specifically established and well delineated exceptions," a warrantless search is a violation of the Fourth Amendment even when based on probable cause. *See Coolidge* v. *New Hampshire,* 403 U.S. 443, 455. The question squarely raised by this appeal is whether warrantless arrests should likewise be treated as presumptively invalid. Prior to the decision by the Ninth Circuit in *United States* v. *Watson,* 504 F.2d 849 (1974), *cert. granted* 420 U.S. 924 (1975), this question had been consistently answered in the negative.[5] Presumably it will be answered definitively by the Supreme Court in the *Watson* case since the Court has granted certiorari.

We have not previously been required to decide this precise question, although we have twice noted our opinion

[4] Defendant was arrested by agents of the United States Secret Service, who by 18 U.S.C. § 3056 are "authorized to make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony." The Government agents had probable cause to arrest the defendants by, at the latest, November 21, 1972, but did not arrest him until November 24, 1972. Although investigation continued during this period, the agents knew no more about Fairchild at the time of his arrest than they did three days earlier. Thus, they had ample time in which to obtain a warrant.

[5] *Ford* v. *United States,* 352 F.2d 927 (D.C. Cir. 1965) (*en banc*); *United States* v. *Hall,* 348 F.2d 837 (2d Cir. 1965); *United States* v. *Miles,* 468 F.2d 482 (3rd Cir., 1972); *United States* v. *Morris,* 477 F.2d 657 (5th Cir. 1973); *United States* v. *Fachini,* 466 F.2d 53 (6th Cir. 1972); *United States* v. *Bazinet,* 462 F.2d 982 (8th Cir. 1972).

that no warrant is required when there is probable cause to arrest. *See United States* v. *Rosselli,* 506 F.2d 627, 629 n. 4 (1974); *United States* v. *Cantu,* No. 74-2037, July 22, 1975, slip opinion at 4, n. 5. In these circumstances it seems appropriate for us to leave to the Supreme Court the question whether a well settled rule of constitutional law should now be changed.[6]

III.

Defendant argues that the evidence is insufficient to support the conviction because the testimony of the principal witness, one South, is patently incredible. The asserted incredibility stems from the fact that South testified that he purchased notes from the defendant at a

[6] The principal arguments in favor of imposing the same warrant requirement for arrests as for searches are (1) that the language of the Fourth Amendment does not differentiate between searches and arrests; (2) that an arrest, even in a public place, may be at least as offensive to the citizen as a search of his home, and therefore comparable reasons of policy would support a rule requiring the prior assessment of probable cause by a neutral and detached magistrate; and (3) that such a rule would preclude the possibility that the police might arrange the time and place of an arrest to justify searches for which no warrant could be obtained. The principal arguments to the contrary are (1) that the existing rule is supported by the common law setting in which the Fourth Amendment was drafted, see *United States* v. *Hall,* 348 F.2d 837, 841 (2d Cir. 1965); (2) an exclusionary rule requiring arrest warrants in all cases, absent special circumstances, would have no deterrent effect unless the police were in fact seeking evidence, since an illegal arrest does not confer immunity on the arrestee; (3) the introduction of an additional procedural requirement in the administration of our system of criminal justice would impose some additional cost on an already overburdened system; and (4) the existence of a viable common law remedy for false arrest, as well as a federal remedy under 42 U.S.C. § 1983, may already provide an adequate deterrent to irresponsible arrests.

price of $40 per 100 and resold them at a lower price. The record, however, contains an explanation of this testimony which the jury was entitled to credit. South's testimony indicates that he had not previously passed any counterfeit bills and made the decision to sell them at a loss because he was afraid to try to pass them. Although defendant makes a number of other arguments questioning the credibility of South's testimony, we are satisfied that the jury was entitled to believe the incriminating evidence.

IV.

Finally, defendant argues that the testimony of the witness Lee should have been excluded because it was irrelevant and grossly inflammatory. Lee testified that, on a date shortly after the events charged in the indictment, Fairchild showed Lee a large quantity of bills in the trunk of his car, told Lee they were counterfeit, and offered to let Lee sell them.

Evidence of other criminal transactions is, of course, not admissible to show that the defendant has a "propensity" to commit the charged offense. *United States* v. *Yarbrough,* 352 F.2d 491 (6th Cir. 1965). Such evidence may, however, be admissible if, entirely apart from the matter of "propensity," it has a tendency to make the existence of an element of the crime charged more probable than it would be without such evidence. See Rules 401 and 404(b) of the Fed. Rules of Evidence; *United States* v. *McCoy,* 517 F.2d 41, 43-44 (7th Cir. 1975); *United States* v. *Rivera,* 437 F.2d 879 (7th Cir. 1971), *cert. denied,* 402 U.S. 947. Lee's testimony in this case was relevant to an element of each count. The fact that Fairchild was in possession of a supply of counterfeit bills tended to prove that

he had the ability to distribute the notes described in both counts and, further, that the passing of the single note described in Count II was not a mere accident or mistake.

Even though relevant, the evidence could have been excluded had the trial court found that its prejudicial effect outweighed its probative value. Fed. Rule of Evidence 403. However, such balancing is in the first instance left to the sound discretion of the trial judge, and there is no ground to say that he abused that discretion in this case.

AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

Opinion by Judge Stevens

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

November 25, 1975
Before
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*
Hon. ROBERT L. KUNZIG, *Judge* *

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 75-1283 vs.

ERNEST FAIRCHILD,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois
Eastern Division
No. 74 CR 538
FRANK J. MCGARR, *Judge.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court AFFIRMED, in accordance with the opinion of this Court filed this date.

* Honorable Robert L. Kunzig of the United States Court of Claims is sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

December 23, 1975.
Before
Hon. JOHN PAUL STEVENS, *Circuit Justice* *
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. ROBERT L. KUNZIG, *Judge* **

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 75-1283 vs.

ERNEST FAIRCHILD,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 74 CR 538

O R D E R

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing be, and the same is hereby, DENIED.

* Mr. Justice Stevens participated initially as Circuit Judge, and on and after December 19, 1975 as Circuit Justice.

** Honorable Robert L. Kunzig of the United States Court of Claims is sitting by designation.

No. 75-1033

In the Supreme Court of the United States

OCTOBER TERM, 1975

ERNEST FAIRCHILD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1033

ERNEST FAIRCHILD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted after a jury trial in the United States District Court for the Northern District of Illinois of passing a counterfeit Federal Reserve note, in violation of 18 U.S.C. 472, and of selling counterfeit Federal Reserve notes, in violation of 18 U.S.C. 473. He was sentenced to two concurrent three-year terms of imprisonment. The court of appeals affirmed (Pet. App. 1-7).

Petitioner's sole claim is that his warrantless arrest in a public place by federal agents who had ample time to obtain a warrant was unreasonable under the Fourth Amendment, and that therefore evidence seized in a search incident to that arrest should have been suppressed at trial. Petitioner concedes (Pet. 8) that the agents had probable cause to arrest him.

United States v. *Watson,* No. 74-538, decided January 26, 1976, in which this Court upheld the validity of

warrantless probable cause arrests in public places, is dispositive of petitioner's contention.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1976.

DOJ-1976-03